

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA**

KARL FONTENOT,)
)
)
Petitioner,)
)
v.) Case No. CIV-16-69-JHP
)
JOE ALLBAUGH, Director,¹)
)
)
Respondent.)

**EMERGENCY MOTION FOR RECONSIDERATION OF RESPONDENT'S
EMERGENCY MOTION TO UNSEAL**

Comes now Respondent, by and through Mike Hunter, Attorney General of the State of Oklahoma, pursuant to the Order of the Court of Appeals for the Tenth Circuit requiring Respondent to review documents previously placed under seal by this Court, and requests this Court to reconsider its Order of October 21, 2019 (Doc. 165) (*see* Order, 19-7045, Oct. 15, 2019) (Attachment 1). In support of this Motion, Respondent states the following:

1. On October 15, 2019, pursuant to an *Order* of the Court of Appeals for the Tenth Circuit, Respondent was “directed to review the sealed documents in the record and determine which sealed documents are necessary [to designate for the record on appeal]” (Attachment 1, p. 1).
2. Pursuant to the Order of the Court of Appeals for the Tenth Circuit, Respondent was also directed to re-file a *Designation of Record on Appeal* within seven (7) days of the Order, or by October 22, 2019, based upon such review (Attachment 1, pp. 1-2).

¹ Scott Crow has replaced Joe Allbaugh as Interim Director of the Oklahoma Department of Corrections and should be substituted as the party Respondent pursuant to Fed. R. Civ. P. 25(d).

3. On October 16, 2019, Respondent's counsel began working diligently with both this Court and Petitioner's counsel to open the record according to the Tenth Circuit's Order of October 15, 2019.
4. Petitioner's counsel agreed that Docs. 35, 36, 37, 38, 39, 40, 41, 45, 47 could be unsealed; however, other items on the docket sheet must remain sealed from Respondent's view because, upon her review, those items (Docs. 25, 27-28, 30-33, 50-52, and 54) all related to Criminal Justice Act (CJA) (18 U.S.C. § 3006A(a)) expense material.
5. Respondent's counsel clearly stated its intent in its Motion to "review," pursuant to the Order of the Tenth Circuit Court of Appeals, **all** sealed documents that may be relevant to the pending appeal, to "determine which sealed documents are necessary," before they can re-file anew a "fully compliant" designation of record within "7 days" of the Order (Attachment 1, pp. 1-2) ("Appellant is directed to review the sealed documents in the record and determine which sealed documents are necessary.").
6. As Officers of the Court, Respondent's counsel promised during its review to quickly overlook any document identifiable as CJA material because they were solely interested in carrying out the Court of Appeals' directive to review the sealed portions of the record to ensure that a "fully compliant designation of record . . . includ[ing] only the necessary sealed items" were filed in the pending appeal (Attachment 1).
7. On October 21, 2019, this Court entered a Minute Order granting in part and denying in part Respondent's Motion. This Court unsealed Docs. 35, 36, 37, 38, 39, 40, 41, 45, 46, 47, and 48 and refused to unseal Docs. 25, 27-28, 30-33, 50-52, and 54. This Court

determined that Docs. 25, 27-28, 30-33, 50-52, and 54 could not be unsealed because they “pertain to the Criminal Justice Act . . . expense material” (Doc. 165).

8. Today, October 22, 2019, in light of the fact that the Tenth Circuit’s Order was not wholly fulfilled, Respondent has requested an additional fourteen (14) days to file a fully compliant designation of record.

Respondent’s counsel is merely trying to properly designate an appeal record according to 10th Cir. R. 10. The Order of the Tenth Circuit Court of Appeals has not yet been carried out so that Respondent’s counsel may designate a compliant record. From the review thus far, the need for Respondent’s counsel to review all of the record is heightened.

Respondent has reviewed the documents that have been unsealed by this Court. The pleadings and Orders in Docs. 35-38 reflect that *ex parte* motions, hearings, and discovery without notice to Respondent were occurring. Further, this Court made some early factual findings in February, 2017, without notice to Respondent or an opportunity to be heard (Doc. 38). Items such as this are important to designating the record on appeal because they might reflect upon claims Respondent is making on appeal. As ordered by the Tenth Circuit, Respondent must see the entire record to ensure there is not more. Respondent is especially concerned as Docs. 41, 45, 46, 47, and 48 clearly relate only to CJA material, yet the Court determined these were not CJA material.² Because the unsealed items included some CJA material, the sealed items may include proper non-CJA material for Respondent’s viewing. Respondent submits that the Order of the Court of Appeals should be carried out in full to ensure the Respondent knows what items to designate as part of the record in this appeal.

² Counsel for Respondent did not review these documents once it was ascertained they were CJA material. Moreover, the Court unsealed Docs. 46 and 48, which Respondent had not reported any agreement thereon.

Wherefore, for the above reasons, Respondent once again urges this Court to comply with the Order of the Court of Appeals for the Tenth Circuit directing Respondent to view the sealed items in the docket to ensure a fully compliant designation of record can be filed in this case.

Respectfully submitted,

**MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA**

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on the 22th day of October, 2019, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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